

#95  
IN THE MATTER OF THE ONTARIO HUMAN RIGHTS  
CODE R.S.O. 1970, CHAPTER 318, AS AMENDED

AND IN THE MATTER OF the complaint made by  
Ms. Kim McGuire of Scarborough, Ontario,  
alleging discrimination in the denial of  
services and facilities by the Orchard Park  
Tavern, 1684 Queen Street East, Toronto,  
Ontario

Board of Inquiry

D. A. Soberman

Appearances:

- |                    |  |
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| Ms. Janet E. Minor | - Counsel for the Ontario Human Rights Commission and the Complainant, Ms. Kim McGuire |
| Mr. Terry Chemij   | - for himself, carrying on business under the name and style of Orchard Park Tavern    |



The subject of this enquiry is the complaint of Ms. Kim McGuire against the Orchard Park Tavern, alleging that it discriminated against her in violation of section 2, subsection 1(a) and (b) of the Ontario Human Rights Code, R.S.O. 1970, c. 318 as amended, by denying her service, or refusing to provide her with service, in an area of the tavern to which the public is customarily admitted, because of her sex.

#### THE FACTS

The facts are not in dispute and may be briefly stated. Ms. McGuire is a young woman employed by the Department of Employment and Immigration. On Monday, May 15, 1978, sometime after 10:00 p.m. Ms. McGuire and a friend, Mr. Steven Stringer, entered the main room of the Orchard Park Tavern on the ground floor, sat at a table and ordered draft beer. A band was playing nearby and they found the sound too loud to carry on a conversation comfortably. They noticed an area farther away from the band and separated by a light partition. When they had finished their beer they moved to a table in that area and waited to be served a second drink. A waiter went by a little distance away, and said that because the area was for men only Ms. McGuire would not be served. Ms. McGuire was taken somewhat aback and approached the bar to speak to the waiter. She said that he was breaking the law by refusing to serve her. He disagreed and said that the tavern management had discretion



to designate a "men only" area. When it became evident that the couple would not be served in that area they left the tavern. Ms. McGuire was angry and somewhat upset by the incident, as confirmed by Mr. Stringer's testimony.

Ms. McGuire remained sufficiently annoyed the following day that she telephoned the Human Rights Commission to inquire whether a tavern could indeed designate a "men only" area. She was informed that such a practice was illegal and was advised to return to the tavern to see whether what had occurred was an isolated incident or part of the Orchard Park Tavern's policy.

On Thursday, May 25, 1978 at about 10:00 p.m. Ms. McGuire and another young woman, Ms. Cathie Freeman returned to the Orchard Park Tavern and went straight to the area where Ms. McGuire had been refused service ten days earlier. Shortly after they had sat down at a table, a waiter came by and told them that they would not be served in that area because it was a "men's room", and he asked them to leave. Within a few minutes a second man approached the table and Ms. McGuire again asked whether they would be served. When he said no, she asked to see the manager. He replied that he was the manager. Ms. McGuire asked why they would not be served and the manager said he would not allow them to sit there and watch the men "take whizzes in the washroom". He pointed out that they were sitting close to swinging doors leading to the men's washroom. Ms. McGuire and Ms. Freeman expressed surprise as neither of them had noticed the washroom





until that time.

The manager then moved away and approached the bar. Ms. McGuire followed and asked him for his name. She pointed out that the law had changed and that it was no longer legal to have areas designated for men only. The manager replied that it was his establishment, that he made the rules and he would decide "who drinks and where". If someone was disorderly he would make them leave. The two women were not served and left shortly afterwards.

Ms. McGuire made her complaint to the Human Rights Commission and it undertook to investigate the matter. Mr. Roger Palacio, a Commission officer, arranged to visit the premises of the Orchard Park Tavern and interview Mr. T. Chemij, the manager of the tavern. Mr. Chemij took Mr. Palacio on a tour of the tavern which has a seating capacity of 1005 on three floors. There are no signs posted stating any area is for men only, but Mr. Chemij freely admitted that there is a house rule designating the area where the incidents occurred as one exclusively for men. Waiters have been instructed that women customers should be told that they should go to other parts of the tavern for service and will not be served in the "men only" area. The area in question seats about 50 persons and is furnished with wooden chairs and tables without upholstery and a bare concrete floor.

Mr. Palacio tried to resolve the complaint by asking Mr. Chemij to change the house rule and permit women





in the area for men. Mr. Chemij refused. He denied practising discrimination against women because men and women are given service everywhere in the tavern except the one small area designated for men only.

In his evidence, Mr. Chemij stated he could not remember the incidents with Ms. McGuire in detail, as over a year has passed since they occurred. However, he does not deny any of the facts and agrees that they probably did happen as stated by Ms. McGuire and her friends. Mr. Chemij stated that prior to changes in the Liquor Licence Act in 1975 there had been a designated men's area in the tavern and that after the change in the law "everything was wide open", that is, women were allowed into the area designated for men. He said that he had complaints from women about the language and conduct of men in that area and also that there were more fights and problems. After a month or so Mr. Chemij returned to the old arrangement and women were not permitted in the area.

According to Mr. Chemij, "The customers in the back room are very tough. There is sometimes heavy gambling going on, and we have complaints from women that they do not like the language or the way people are dressed back there, because we are dealing with a certain clientele from the race track that are dealing with horses and they don't usually have a chance to shower before they come over.... Everything else is very plush, the top floor, the main floor and the basement. There is no carpeting in the men's room,



all wooden chairs, and it is just not a nice atmosphere." A little later in his evidence, Mr. Chemij added, "It is for their own [women's] safety to move to a different section, that's all I can say. We have had women back there and it is dangerous. It is dangerous. We had a man shot back there and killed. Now, this happened about six years ago, which is on the record. It is very vicious back there, there is no two ways about it."

In summary then, the incidents as related by Ms. McGuire and her companions occurred as she has stated. The respondent accepts those facts. He further agrees that the incidents were not isolated deviations from normal policy but were examples of the tavern's policy of keeping a specific area for men only. Finally, Mr. Chemij refuses to change his house rule as he believes he is entitled to maintain it as part of his prerogative of management.

#### THE LAW

Until 1975 the liquor licensing laws of Ontario contained the possibility of conflict with the Ontario Human Rights Code. In particular, s. 21(1) of the Liquor Licence Act, R.S.O. 1970, c. 250, provided for licensing establishments "for the sale and consumption of beer in premises to which men only are admitted". However, s. 60 of the Liquor Licence Act, 1975, S.O. 1975, c. 40, repealed the earlier act, and itself contains no classes of licences with exclusions based on sex. It seems an irresistible



inference from the 1975 changes that the legislature intended to abolish licensed establishments distinguishing between the sexes, especially in the light of the wording of the Ontario Human Rights Code, R.S.O. 1970, c. 318, s. 2(1)(a) and (b) as amended, which states:

No person...shall

- (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or
- (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,

because of the race, creed, colour, sex...  
of such person or class of persons...

It seems clear then that since 1975 this province has abolished licensed premises which discriminate between the sexes. It also seems clear that s. 2(1)(a) and (b) applies to licensed premises in Ontario such as the Orchard Park Tavern and expressly prohibits discrimination based on sex in offering services or facilities. That is, it makes refusal to serve women a contravention of the Code. On the face of it then, the refusal to serve Ms. McGuire on the first occasion and Ms. McGuire and Ms. Freeman on the second in a "place to which the public is customarily admitted" contravened s. 2(1) of the Code.

Could there be any lawful excuse for such refusal? The Code itself contains an exception in s. 2(2). It states that:





Subsection 1 does not apply to prevent the barring of any person because of sex of such person from any accommodation, services or facilities upon the ground of public decency.

It is common ground that this subsection refers to such things as separate toilet and bath facilities for men and women. There may be other comparable things, such as saunas and swimming pools, but the subsection does not appear to have a wide scope.

Mr. Chemij stated that his main reasons for refusing women service in the designated area were for the comfort and safety of women patrons and to minimize the likelihood of fights breaking out which in his opinion are more likely to occur when women are present. No doubt Mr. Chemij honestly holds these opinions and believes his house rules are in the best interests of everyone in the tavern. Indeed, as a question of fact he may be correct. However, it does not seem that the exception in subsection 2, dealing with "public decency" can be interpreted so broadly as to include the reasons given by Mr. Chemij. Accordingly, Mr. Chemij's reasons for designating a "men only" area in the Orchard Park Tavern do not constitute a lawful excuse for refusing to serve women in that area. On the contrary, it seems clear that the legislature of this province placed a higher public value on abolition of discrimination generally than on the particular interests of a tavern owner in serving his patrons even when the public interest is at some cost to the owner. This law appears to be simply an instance of the public good requiring





some sacrifice on the part of an individual citizen or citizens.

A tavern may refuse to serve any individual if in its discretion, serving such person would be improper. This discretion must be exercised from time to time on short notice. The manager or waiter must use his judgment quickly and accordingly needs considerable latitude. He should not with hindsight be held to too high a standard. Nevertheless, there are standards by which the exercise of this discretion may be judged. There must be some evidence about the conduct or state of sobriety of the individual in question. More important, the discretion requires a judgment to be made with respect to a particular individual at a particular time. A house rule that all persons of a particular class, such as one based on sex or colour, will not be served cannot be considered an exercise of discretion given to taverns to refuse to serve a particular individual. In the present case, there is no evidence that Ms. McGuire or her companions gave any cause for the exercise of discretion in refusing to serve them. No serious question of conduct arose, despite the one reference to the proximity of the men's washroom. In any event Mr. Chemij has himself asserted that there is a general rule excluding women from the area irrespective of the conduct of an individual patron and that he was enforcing and continues to enforce that rule. Accordingly, the discretion to refuse to serve a particular patron does



not apply in this case.

Therefore, the Orchard Park Tavern has discriminated against Ms. Kim McGuire contrary to the provisions of the Ontario Human Rights Code without lawful excuse. It is not the role of this inquiry to solve Mr. Chemij's dilemma, such as it may be, with certain clientele from the nearby race track. If he wishes to keep a furnished and segregated area in his tavern to attract that clientele, it is for him to take the responsibility. But he cannot lawfully exclude women from the area. A tavern may advise any patron, woman or man, that an area of the tavern is rather rough and rowdy, and that she or he might prefer to sit elsewhere. However, the owner may be treading on dangerous ground in so doing; counsel for the Commission expressed reservations about systematically informing any class of clientele, in this case women, that they ought not to sit in a certain area even if it is only in the form of advice. Whether such conduct might amount to discrimination under s. 2 of the Code is not before this inquiry, and no implication should be drawn from the present finding.

The complainant, Ms. McGuire, is a mature young woman with a university education. Her anger and annoyance seemed less concerned with the affront to herself personally than with women's rights more generally. I believe she was more interested in seeing these rights vindicated than in receiving a personal remedy. Even so, it is important that a citizen who is aggrieved through



interference with her human rights as guaranteed by the laws of Ontario be compensated appropriately. The amount should be modest in this case because the complainant has not suffered substantial injury. On the other hand it should not be merely nominal, as the complainant was upset by the incident and in order to vindicate her rights returned to the premises of the respondent only to be rebuffed a second time. Accordingly, I order the respondent to pay Ms. McGuire the sum of \$100.00.

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D. A. SOBERMAN,  
Chairman, Board of Inquiry.





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O R D E R

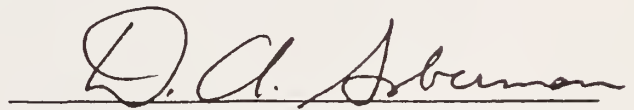
This matter coming on for hearing on the 21st day  
of June, 1979, before this Board of Inquiry, pursuant to the  
appointment of Robert Elgie, Minister of Labour, dated the  
19th day of December, 1978, in the presence of Counsel for  
the Human Rights Commission and Mr. Terry Chemij appearing  
for himself carrying on business under the name and style of  
Orchard Park Tavern, upon hearing evidence adduced by the  
parties and what was alleged by the parties, and upon  
finding that the complaint was substantiated:

1. It is ordered that the Respondent write to  
the Ontario Human Rights Commission under-  
taking that he will comply with the Code  
by changing his house rule and by permitting  
women to be served anywhere in his premises  
including the area designated for men only.
2. And it is ordered that the Respondent post  
the standard Human Rights card in a prominent  
location near the main entrance to the  
premises.



3. And it is ordered that the Respondent comply with paragraphs one and two within 90 days of the date of this order.
4. And it is ordered that the Human Rights Commission may inspect the premises of the Respondent for compliance at any time during regular business hours for two years from the date of this order.
5. It is further ordered that the Respondent pay the sum of \$100.00 by way of compensation to the Complainant.

Dated at Kingston the 13th day of July, 1979.

A handwritten signature in dark ink, reading "D. A. Soberman", is written over a horizontal line.

D. A. SOBERMAN,  
Chairman, Board of Inquiry.

